UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

TRI-STATE WHOLESALE BUILDING SUPPLIES, INC.	:	
and	:	**Case 9-CA-125950**
GARY LARKIN, AN INDIVIDUAL	:	

TRI-STATE WHOLESALE BUILDING SUPPLIES, INC.'S REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

The Respondent in this matter, Tri-State Wholesale Building Supplies, Inc., (herein, "Tri-State" or the "Company") through its attorneys Edward S. Dorsey and Wood & Lamping and Mark Fitch and Fitch & Spegal, hereby files its Reply Brief in Support of its Exceptions to the Administrative Law Judge's Decision.

1. The Company proved by the preponderance of the evidence that the replacements were permanent.

In his Answering Brief, the General Counsel essentially concedes that the Company intended to hire the replacements as permanent, not temporary. This is a wise concession. As shown in the Company's Exceptions, pp. 3 – 5, there is abundant record evidence supporting this conclusion. And there is no evidence to the contrary.

The General Counsel thus limits his argument to his contention that the Company failed to prove that the replacements had a "mutual understanding" that they were hired on a permanent, not temporary, basis. On this argument, the General Counsel errs by misstating the

Company's burden and ignoring substantial record evidence. Thus, the General Counsel argues that the Company can satisfy its burden only by direct evidence, i.e., only by having the replacements testify as to their understanding, or perhaps by introducing statements signed by the replacements acknowledging that they understood they were permanent. However, it is well established that a party may satisfy its burden of proof either by direct evidence or by circumstantial evidence, provided that the inferences drawn from the evidence are reasonable and the evidence is substantial. *Sam's Club v. NLRB*, 173 F.3d 233 (4th Cir. 1999); *NLRB v. Instrument Corp. of America*, 714 F.2d 324, 328 (4th Cir. 1983).

Moreover, as to the issue here, the Board has held that there are no magic words that must be used to make a replacement "permanent." *Jones Plastic & Engineering Co., supra*, 351 NLRB at 66, n.9; *Crown Beer Distributors*, 296 NLRB 541, 549 (1989). Rather, the critical question is whether "the replacements *were hired in a manner* that would 'show that the men [and women] who replaced the strikers were regarded by themselves and the [employer] as having received their jobs on a permanent basis.'" *Consolidated Delivery & Logistics, Inc.*, 337 NLRB 524, 526 (2002) quoting *Target Rock Corp.*, 324 NLRB 373, 373 (1997) and *Georgia Highway Express*, 165 NLRB 514, 515 (1967) (emphasis added). This burden is satisfied when there is an "adequate showing" that there was a "mutual understanding" between the Company and the replacements that their employment was "permanent" and not "temporary." *Target Rock Corp., supra*, 324 NLRB at 373; *Hanson Brothers Enterprises, supra,* 279 NLRB at 741; *Associated Grocers*, 253 NLRB 31, 32 (1980). Finally, the Company satisfies its burden by making the "adequate showing" as to the "manner" of the hiring by a preponderance of the evidence.

Here, the Company plainly satisfied this burden. Thus, *all* of the record evidence supports the conclusion that the replacements were hired in a manner that would make them understand that they were permanent and not temporary. Conversely, there is *no* record evidence suggesting that the replacements could have understood their hiring as being temporary, and not permanent.

The record evidence shows that the replacements were hired in a manner that would make them understand that they were permanent. This is first based upon the careful procedure the Company used in hiring them. Thus, just as one would be more careful in picking a spouse than in picking someone to just date, an employer is more careful when hiring a permanent employee than a temporary employee. Here, each candidate was interviewed by at least two people, the Company Operations Manager, and its HR Consultant. Moreover, about half of the candidates were also personally interviewed by the Company President. After each interview, the interviewers conferred separately to decide whether or not to hire the candidate. If a decision to hire was made, an offer was immediately extended. Clearly, this level of care and attention to the hiring decision would cause the candidates to conclude that they were being hired on a permanent, not temporary, basis.

The offer of employment included a similar level of care about the employment relationship.[1] The offer included a reference to salary and health insurance.[2] It specified that the offer was contingent on passing both a background check and a drug screen.[3] The Company

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[1] The General Counsel makes the incredible argument (Br. 9) that the Company's offers to several replacements were "shams" because the Company knew that it could not hire those persons. The General Counsel's support for this assertion is G.C. Exhibits 5 and 7. Those exhibits are emails four and five days *after* the offers were made discussing the results of the background checks and drug tests. In other words, the General Counsel's accusation of sham offers is based on a wild assertion that the Company already knew on January 11 the results of background checks and drug tests on those to whom it was then making employment offers.

[2] See further discussion on this issue at p. 12 of the Company's Exceptions to the Administrative Law Judge's Decision.

[3] The General Counsel argues (Br. p. 4) that the requirement of a drug test shows nothing because the Company drug tests all its employees, even temporary ones. This ignores the uncontradicted testimony of President Caldon that even though it has a category of temporary employees in its handbook, the Company does not hire

President personally explained to each new employee where to go to get a blood test, and gave them the required form for doing so. (Tr. 128 - 129). Again, candidates would reasonably conclude that the Company would offer health insurance and require background checks and drug screens only for employees it wanted to be permanent. And, significantly, they would reasonably conclude that the Company President's direct involvement in their hiring would only happen if they were being hired on a permanent and not temporary basis.[4]

Finally, as the General Counsel essentially concedes, the Company fully intended to hire the replacements on a permanent basis. It is reasonable to infer from this fact that the Company acted consistent with this intention in communication with, and hiring of, the replacements. In other words, it is unlikely that the Company said or did anything inconsistent with its intention to hire permanent replacements.

Thus, the reasonable inferences from the record evidence constitute substantial evidence that the replacements understood that they were permanent employees. As noted in the Company's Exceptions, the manner of their hiring gave the replacements every reason to expect that they were just as "permanent" as any other employee hired by the Company in the past 44 years.

Any discussion of the burden of proof under a preponderance of evidence standard must also include a discussion of the evidence tending to show that the replacements were hired in a manner that would cause them to conclude that they were temporary. The fact is that there is no such evidence. Nowhere does the General Counsel list, itemize, or otherwise describe any

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temporary employees. (Tr. 138). It also ignores the fact that the Company could, if it so desired, readily change its procedure under the unusual circumstances presented here.

[4] The General Counsel contends (Br. 10) that because employment documents for only 9 of the replacements were introduced into evidence, only 9 replacements were hired. There was no hearing testimony that the records introduced into evidence constituted all of the records relating to all of the replacements. Moreover, the Company produced pursuant to a subpoena from the General Counsel the employment documents relating to the other replacements. The General Counsel thus knows that his assertion that there only nine is false.

evidence on which the replacements could have concluded that they were hired on a temporary basis.[5] Indeed, prior to the trial before the Administrative Law Judge, the General Counsel had a full opportunity to investigate this issue. For example, the General Counsel had the names and contact information for each of the replacements. Had the General Counsel found any evidence suggesting that the replacements had reason to view themselves as temporary and not permanent, the General Counsel surely would have introduced that evidence at trial. Yet he introduced no such evidence.

It is thus clear that there is substantial and credible circumstantial evidence demonstrating that the replacements understood that they were permanent and not temporary. There is no credible record evidence indicating that the replacements understood that they were temporary. In this context, the conclusion must be that the Company carried its burden of proof and demonstrated that it hired permanent replacements.

2. The Company's January 12, 2014, letter held out the possibility of reinstatement, and thus did not terminate the strikers.

The General Counsel contends that the Company gave no factual support for its exception to the Administrative Law Judge's finding that it terminated the strikers by sending them the January 12 letter. The General Counsel ignores the Company's reliance on the terms of that letter itself. That letter specifically held out the possibility of reinstatement. Thus, even though the letter indicated that each employee was terminated, it also implicitly acknowledged the fact that as economic strikers, they might later be offered reinstatement.

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[5] In response to a Company argument that the replacements had no basis to question the permanency of their employment, the General Counsel asserts (Br. P.4) that "three of the replacements" knew people who worked at the Company at the time of the walkout. From this, the General Counsel speculates, without any evidentiary basis, that those replacements talked about the walkout with the Company employee they knew. While that is a possibility, it is by no means more likely than not. If there were any conversations at all, those were more likely to be about what it was like to work for the Company. In any event, two of those three employees were relatives of Company President Caldon. It is very unlikely that they had any concerns about the permanency of their employment.

In this regard, this letter compares quite favorably with the letter sent in *Vulcan-Hart Corp. v. NLRB*, 718 F. 2d 269 (8th Cir. 1983). There the employer sent a letter to strikers telling them that their employment had been "terminated" because they had been permanently replaced and that their working relationship with the employer had ended. It advised each striker that the employer would maintain their name and address so that the employer could notify them of openings they could take as a "new employee." And finally, the letter advised the strikers that they should "seek employment elsewhere, at this time." Despite the fact that the employer's letter in *Vulcan-Hart* went well beyond the Company's letter here, the Eighth Circuit unanimously found that the letter "did not necessarily operate[] as a discharge letter." 718 F.2d at 275. The same conclusion is correct here.

The Administrative Law Judge clearly erred in relying on G.C. Exhibits 9 and 10 in finding that the Company intended to illegally terminate the strikers and not reinstate them. These exhibits show the Company's deliberative process in dealing with the strike. Prior to this incident, the Company was naïve with respect to protected concerted activities. It had never before had a strike, a union or a union organizing drive. In this context, it is to its credit that it did not simply terminate the strikers in a knee jerk response to the strike. Rather, Company President Caldon sought advice from other CEOs, its HR Consultants, and its attorneys. Not surprisingly, the Company considered different options as to how to respond to the strike, and some of those options would have violated the NLRA. The Company did not make a final decision as to how to respond to the strike until a conference call on Friday afternoon January 10. See the Company's Exceptions, p. 14. To hold that the Company's mere consideration of illegal options is somehow evidence that the option it ultimately selected was also illegal finds the Company guilty of a "thought crime." George Orwell properly demonized the concept of thought

crimes in his novel "1984." The Board should not countenance the Administrative Law Judge's attempt to incorporate them into the NLRA.

For the forgoing reasons, and the reasons stated in the Company's Exceptions, the Administrative Law Judge's decision should be vacated, and the Complaint and Charge dismissed in their entirety.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT
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Certificate of Service

I certify that the foregoing has been served by email on Gary Larkin and Daniel Goode this 19th day of December, 2014.

Edward S. Dorsey